IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 467 OF 1994.

Ramchandar Ramadhar Yadav. ... Petitioner.

V/s.

1. Hyderabad (Sind) National
Collegiate Board.

2. Smt.Kishinibai Sitaldas
Punwani Jai Hind Academy High
School & Junior College. ... Respondents.

Manish Mistry i/b M.M.Vashi for the petitioner.

J.S.Chandani for the respondents.

CORAM: : V.C.DAGA, J.

RESERVED ON : 25th November 2005.

PRONOUNCED ON : 23rd December 2005.

JUDGMENT :

. This petition is directed against the judgment and order dated 3rd September, 1993 passed by the Presiding Officer, School Tribunal, Bombay ("Tribunal" for short) in Appeal No.GEN/126/THN-55 of 1993, whereby appeal filed by the petitioner came to be rejected holding that his appointment was for one academic year with effect from 3rd December, 1992 as such he was a temporary employee.

Factual Matrix :
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2. The factual matrix of the case reveals that the petitioner came to be appointed as Peon, pursuant to the application made by him, with effect from 3rd December, 1992. The relevant term of the appointment order reads as under:

> To
> Shri Ramchander R. Yadav.
>
> " With reference to your application .... from time to time.
>
> 2. Your appointment is temporary for a period of in clear vacancy of Shri Shejwal Shivram who in the leave vacancy has resigned. After expiry of the above period, your services shall stand terminated without any notice.

3. Pursuant to the aforesaid order, petitioner reported on duty with effect from 3rd December, 1992. His appointment was approved by the Education Officer vide order dated 19th March, 1993 for the current academic year. The petitioner was also informed by the school management vide its letter dated 10th May, 1993 that his appointment has been approved up to the last working day of the academic year 1992-93 i.e. up to 13th June, 1993 by the Education Department, Thane. He was further informed by the very same letter that he would stand relieved with effect

from 13th June, 1993. However, no effect was given to this order. On the expiry, he was asked to report on duty on 14th June, 1993. Accordingly, petitioner claims to have reported on 14th June, 1993 but he was asked to work as Sweeper, which he refused. Thus on the next day, i.e. 15th June, 1993, when he reported on duty, he was not allowed to resume his duty since he refused to work as Sweeper. This action of oral termination was the subject matter of challenge in the appeal filed before the School Tribunal under section 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 ("M.E.P.S.Act" for short).

4. The petitioner had contended before the Tribunal that he was appointed as Peon on clear vacancy from 3rd December, 1992. That his appointment was approved by the Education Officer. In turn, he was, accordingly, informed by the Principal of the respondents' Junior College and High School, vide letter dated 10th May, 1993. That he was orally told that letter dated 10th May, 1993 was nothing but a routine letter and that he need not take cognisance of the said letter. He, thus, did not challenge the action of

the management. However, as directed, he resumed his duty on 14th June, 1993. On that day he was told by the Principal that his continuation shall be subject to his working as a Sweeper. The petitioner declined to work as a Sweeper. The Principal, therefore, did not permit him to resume his duty from 15th June, 1993.

5. The petitioner claimed that he worked on 14th June, 1993. He, therefore, preferred appeal against the act of oral termination dated 15th June, 1993.

6. On being noticed, the respondents appeared and filed their written statement to oppose the claim set up by the appellant (petitioner herein) contending that his services were terminated vide notice dated 10th May, 1993 with effect from 13th June, 1993. It was further contended that after receipt of the notice of termination dated 10th May, 1993, the petitioner/ appellant never turned up on 14th June, 1993 as such question of oral termination of his services with effect from 15th June, 1993 did not arise.

7. The respondents had produced muster-roll in support of their contention before the Tribunal to show that the petitioner/ appellant never resumed his duty on 14th June, 1993. It was, thus, contended that the appeal was not maintainable since it was barred by limitation.

8. In order to justify action of termination on merits, it was contended that the services of the petitioner were rightly terminated by notice dated 10th May, 1993 since his work was not satisfactory. That he used to refuse to perform his duty as Peon though he was warned on several occasions. It was denied that the Principal of the respondent-institution had informed the petitioner that order dated 10th May, 1993 was a routine matter and that his services would be continued and that termination order dated 10th May, 1993 would not be acted upon.

9. With the aforesaid rival submissions, the Tribunal proceeded to hear and decide appeal and was pleased to hold that the appointment of the petitioner/ appellant was on temporary basis only for one academic year. The approval granted was from 3rd December, 1992 till the end of that

academic year. The Tribunal further concluded that since 13th June, 1993 was Sunday, petitioner/ appellant had signed muster roll till 12th June, 1993 only. The Tribunal also found that 14th June, 1993 was Monday. On this date petitioner did not sign muster roll. As such, Tribunal concluded that the petitioner/ appellant failed to establish that his services were terminated on 15th June, 1993 The Tribunal, thus, dismissed the appeal filed by the petitioner vide order dated 3rd September, 1993.

10. The aforesaid order is a subject matter of challenge in the present petition filed under Article 226 and 227 of the Constitution of India.

Submissions :
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11. At the outset, learned counsel appearing for the petitioner under his signature filed purshis dated 25th November, 2005 stating therein that the petitioner shall not claim any back-wages in event his petition is allowed. The said purshis is taken on record and marked 'X' for identification.

12. The learned counsel for the petitioner submits that the Tribunal erred in holding that the petitioner was a temporary employee, consequently, his termination vide order dated 10th May, 1993 was legal and valid. He further submits that the Tribunal was wrong in holding that the petitioner did not resume his duty on 14th June, 1993. He further submits that in view of the provision of section 5 of the M.E.P.S.Act and rules framed thereunder, one has to conclude that the appointment of the petitioner was not temporary but it was on probation. He, thus, submits that even if the termination of the petitioner is held to be valid under notice dated 10th May, 1993 even then termination is bad and the same is liable to be quashed and set aside.

13. Per contra, learned counsel for respondents submits that the view taken by the Tribunal is a reasonable and possible view That the appointment order demonstrates that it was on temporary basis as such no fault can be found with the view taken by the Tribunal. In his submission, petition is liable to be dismissed.

Statutory Provisions :
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14. Before proceeding to deal with the rival submissions, it is necessary to turn to the statutory provisions extracted hereinbelow:

. Section 5 of the M.E.P.S. Act reads as under:

> **5. Certain obligations of Management of private schools.**
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> (1) The Management shall, as soon as possible, fill in, in the manner prescribed every permanent vacancy in a private school by the appointment of a person duly qualified to fill such vacancy.
>
> (2) Every person appointed to fill a permanent vacancy shall be on probation for a period of two years. Subject to the provisions of sub-sections (4) and (5), he shall, on completion of this probation period of two years, be deemed to have been confirmed.
>
> (3) If in the opinion of the Management, the work or behaviour of any probationer, during the period of his probation, is not satisfactory, the Management may terminate his services at any time during the said period after giving him one month's notice.
>
> (4) If the services of any probationer are terminated under sub-section (3) and he is reappointed by the Management in the same school or any other school belonging to it within a period of one year from the date on which his services were terminated, then the period of probation undergone by him previously shall be taken into consideration in calculating the required period of probation for the purposes of sub-section (2).

(5) The Management may fill in every temporary vacancy by appointing a person duly qualified to fill such vacancy. The order of appointment shall be drawn up in the form prescribed in that behalf, and shall state the period of appointment of such person.

. The relevant parts of rules 10, 13 and 28 of the Maharashtra Employees of Private Schools, (Condition of Service) Rules, 1981 ("M.E.P.S. Rules" for short) are reproduced hereinbelow:

10. Categories of Employees.-

(1) Employees shall be permanent or non-permanent. Non-permanent employees may be either temporary or on probation.

(2) A temporary employee is one who is appointed to a temporary vacancy for a fixed period.

28. Removal or Termination of Service.-

(1) The services of a temporary employee other than on probation may be terminated by the Management at any time without assigning any reason after giving one calender month's notice or by paying one month's salary (pay and allowances, if any) in lieu of notice.

. In the case of any employee entitled to vacation, the notice shall not be given during the vacation or so as to cover any part of the vacation or within one month after vacation.

....

Consideration :
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15. Having examined the aforesaid statutory provisions, sub-section (1) of section 5 contemplates that the Management shall, as soon as possible, fill in, in the manner prescribed every permanent vacancy in a private school by the appointment of a person duly qualified to fill such vacancy.

. Sub-section (2) contemplates that every person appointed to fill a permanent vacancy shall be on probation for a period of two years. Subject to the provisions of sub-section (4) and (5), he shall, on completion of this probation period of two years, be deemed to have been confirmed.

. Sub-section (3) contemplates that, if in the opinion of the Management, the work or behaviour of any probationer, during the period of his probation, is not satisfactory, the Management may terminate his service at any time during the said period after giving him one month's notice.

. Sub-section (4) has no application.

. Sub-section (5) provides that the Management shall, as soon as possible fill up, in the manner prescribed, in a private school by appointment of a person to fill in such vacancy stating the period of appointment in the appointment order.

16. With the above canvas, if one turns to rule 10 of the M.E.P.S. Rules it contemplates categories of the employees. Said rule lays down that the employee shall be permanent or nonpermanent. Non-permanent employees may be either temporary or on probation. Sub-rule (2) of rule 10 contemplates that a temporary is one who is appointed to a temporary vacancy for a fixed period. Thus, reading of sub-section (5) of section 5 with sub-rule (2) of rule 10 makes it clear that the management can fill in the temporary vacancy by appointing qualified person stating the duration of employment in the prescribed form meant for issuing appointment order.

17. In the aforesaid backdrop, if one turns to the order of appointment of the petitioner, it

would be clear that the petitioner was not appointed for a fixed period. The order of appointment clearly gives an indication that the vacancy in the post of Peon was a clear vacancy caused due to the resignation of one Shri Shejwal Shivram. At any rate, no material is on record to show that the vacancy in the post of Peon was temporary or that there was no permanent vacancy. Having gone through the appointment order, it is clear that the appointment of the petitioner was against clear permanent vacancy notwithstanding the appointment order stipulates it to be temporary. Mere use of the word 'temporary' by itself will not make the appointment temporary.

18. Sub-rule (2) of rule 10 of the M.E.P.S. Rules in clearest possible term lays down that a temporary employee is one who is appointed to a temporary vacancy for a fixed period. The petitioner was never appointed for a fixed period. No duration of the period of employment is to be found in the appointment order. In this view of the matter, considering sub-rule (1) of rule 10, petitioner's appointment will have to be treated as non-permanent but on probation.

19. Having said so, one has to go back to the provisions of sub-sections (2) and (3) of section 5 of the M.E.P.S. Act to consider their impact. Sub-section (2) contemplates that a person has to be appointed to fill permanent vacancy on probation for a period of two years and after completion of two years he is deemed to be confirmed. If, in the opinion of the management, the work or behaviour of the person, who is on probation, is not satisfactory, the management may terminate his services at any time giving him one month's notice.

20. In the case at hand, notice of termination given to the petitioner nowhere contemplates or records any dissatisfaction of the management so far as the work or behaviour of the petitioner during the probation period is concerned. In absence of any imputation of unsatisfactory work or behaviour or any indication indicating dissatisfaction of the management, it was not open for the School Management to terminate services of the petitioner merely by issuing one month's notice. The services of the person, who is on probation, can only be terminated if his work or

behaviour is found to be unsatisfactory or the management is dissatisfied with his work. No material in this behalf is available either in the termination order or on record. No counter affidavit or return has been filed to answer the allegations made in the petition. In the circumstances, the termination of the petitioner without justifiable reason cannot be said to be legal and valid.

21. So far as the impugned order of the Tribunal considering the approval granted by the Education Officer to respondent No.1 is concerned, the order of the Education Officer granting or refusing to grant approval is not relevant to decide the status of the petitioner because the question of grant of approval is between the Education Officer and the management and the same is relevant only for the purposes of grant in aid by the State Government. As a matter of fact, the Education Officer while granting approval ought to have applied his mind to the order of appointment and ought not to have treated it as temporary appointment. He ought to have granted his approval for two years. In the circumstances, the Tribunal was not right in deciding the legality of

the termination order taking shelter of the order of approval granted by the Education Officer.

22. The Tribunal in its order has not at all taken into account the appointment order of the petitioner dated 3rd December, 1992; which was produced by the management; which the Tribunal ought to have taken into account. Consequently, the view taken by the Tribunal that the petitioner was appointed on temporary basis and, therefore, his termination is legal and valid is unsustainable in law.

23. Having held so, let me now turn to the submission of the learned counsel for respondent No.1 that the appeal filed by the petitioner was directed against the act of termination dated 14th June, 1993 and not dated 13th June, 1993. It is not in dispute that 13th June, 1993 was Sunday. It appears that the petitioner must have reported on 14th June, 1993 and he may not have been allowed to work. That is how, 14th June 1993 appears to have been taken as date of termination. Be that as it may, the appeal before the Tribunal was filed on 29th June, 1993, which was filed well within a period of 30 days from the date of either

of the act of termination. In this view of the matter, submission made does not hold water.

24. In the totality of the aforesaid facts and circumstances of this case, the impugned order of the Tribunal is unsustainable and liable to be quashed and set aside.

25. In the result, impugned order is quashed and set aside. Petition is allowed. The Rule is made absolute in terms of this order with no order as to costs.

26. At this stage, learned counsel for the respondents prayed for stay of this order. Learned counsel for the petitioner has strongly opposed this request. However, in the interest of justice, operation of this order is stayed for twelve weeks.

(V.C. DAGA, J.)